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I. Introduction

When comparing the administration of criminal justice in the United States and the European Union, a significant difference quickly becomes apparent: The United States has an elaborate federal system of criminal justice, whereas the European Union does not. In Europe, it is still the single member state that is in charge of criminal prosecution and sentencing and thus providing security for its citizens. The predominant role of the Member States in the areas of freedom, security, and justice is illustrated by the fact that even the European Public Prosecutor—once he is established—will have to lodge an indictment at the national court of a member state.[1] Thus, when talking about European criminal justice, we do not refer to a European criminal court, nor to a European code on criminal procedure, but to a rapidly expanding set of rules governing cooperation in criminal matters. Correspondingly, the European Union's action in the framework of police and judicial cooperation in criminal matters has focused on initiatives in the area of mutual legal assistance in order to overcome traditional impediments to transnational criminal law enforcement.

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[1] *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 86, Sep. 5, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

In the European Union, where citizens can move freely from one member state to another,[2] the transnational enforcement of criminal law is essential. This is why the smooth functioning of cooperation in criminal matters has become a key element in the area of freedom, security, and justice. In order to meet this challenge, the European Union has replaced the traditional regime of mutual legal assistance with new cooperative instruments. For example, the European Arrest Warrant took the place of various multilateral treaties in the framework of the Council of Europe and the European Union as well as bilateral agreements between the Member States.[3]

These new instruments are based on the principle of mutual recognition—the idea that a judicial decision made in one member state can be recognized and executed by the authorities of another Member State.[4] Since the Member States of the European Union share common values and principles (such as rule of law, democracy, and respect for human rights) the Member States shall be permitted to trust in the legality of the judgment of another member state's court.[5] This principle of mutual recognition is riddled with many reservations and can be criticized as being idealistic and as neglecting the fact that the European Union still faces many differences in its national criminal justice systems, including different standards.

In the German courts, the provision on convictions in absentia has emerged as one of the most important exceptions to mutual recognition.[6] The different standards that apply to trials in

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2 *See id.* art. 21.

3 *See* Council Framework Decision, 2002/584/JHA, of 13 June 2002, on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1 [hereinafter European Arrest Warrant].

4 *Id.* art. 1 ¶ 2

5 *Id.* prmbl ¶ 10

6 *See, e.g.*, Oberlandesgericht [Higher Regional Court] Karlsruhe Jan. 4, 2011, 7 Strafverteidiger 426 (Ger.); Oberlandesgericht [Higher Regional Court] Köln Aug. 12, 2010, Entscheidungen der Oberlandesgerichte in Strafsachen und über Ordnungswidrigkeiten [OLGSt] LUCHTERHAND WOLTERS KLUWER, 2011, at section 83 IRG No. 4 (Ger.); Kammergericht [Higher Regional Court Berlin] July 16, 2007, 3 NEUE JURISTISCHE WOCHENSCHRIFT 673, 2008 (Ger.); Oberlandesgericht [Higher Regional Court] Karlsruhe July 13, 2007, 1 NEUE ZEITSCHRIFT FÜR STRAFRECHT - RECHTSPRECHUNGSREPORT [NStZ-RR] 112, 2008 (Ger.); Oberlandesgericht [Higher Regional Court] Stuttgart Jan. 9, 2008, NEUE ZEITSCHRIFT FÜR STRAFRECHT -

absentia in the Member States are illustrated by the case of *Krombach v. France*.[7]

Dieter Krombach was a German national living in southern Germany whose second wife had a daughter from a previous marriage with a French national.[8] During the summer of 1982, the daughter was on school holiday at Krombach's home.[9] One morning she was found dead in her bedroom.[10] The German police conducted an investigation, but found no evidence of assault.[11] As a consequence, the public prosecutor's office decided to take no further action in the case.[12] After the appeal made by the father of the deceased girl was dismissed, he lodged a criminal complaint with the French investigating judge in Paris.[13] In 1991, Krombach was charged in France with the crime of assault resulting in involuntary death.[14] He was summoned for trial, but did not appear in court; subsequently, he was found guilty and sentenced to fifteen years imprisonment in absentia, without his defence counsel being heard.[15] Germany, and later Austria,[16] refused to extradite Krombach to the French authorities.[17] In 2001, the European Court of Human Rights (hereinafter ECtHR) stated that the trial in France breached of Article Six of the Convention.[18] In 2009, Krombach was kidnapped and handed over to the French police; he is now facing a new trial before a

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RECHTSPRECHUNGSREPORT [NStZ-RR] 175, 2008 (Ger.). For an overview on the relevant national law on trials in absentia in Germany, England, France, the Netherlands and Austria see Christiane Paul, *Erstes Unterkapitel: Das Deutsche Strafprozessrecht*, DAS ABWESENHEITSVERFAHREN ALS RECHTSSTAATLICHES PROBLEM 41 (2007) (Ger.).

7 *See* Krombach v. France, 2001-II Eur. Ct. H.R. 35; *see also* Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-01935.

8 *See Krombach v. France*, 2001-II Eur. Ct. H.R. at 42-43.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *See Krombach v. France*, 2011-II Eur. Ct. H.R. at 45.

14 *Id.* at 46.

15 *Id.* at 48-49.

16 Oberlandesgerichte [OLGSt][Higher Regional Court Innsbruck], Feb. 2, 2000, NEUE ZEITSCHRIFT FÜR STRAFRECHT 663, (2000).

17 *See Krombach v. France*, 2011-II Eur. Ct. H.R. at 50.

18 *Id.* at 61.

French court.[19]

Admittedly, the decisions of the French, German, and European courts on this case were delivered before the principle of mutual recognition was adopted as the new paradigm of cooperation in criminal matters. Nonetheless, the case clearly reveals that blind trust cannot serve as a basis for the transnational enforcement of criminal law. Reservations such as the ordre-public-clause and a judicial review in the executing Member State are still necessary.

The central question remains how to balance mutual trust and judicial control in the executing (requested) Member State, or in other words, how to balance the efficiency of transnational cooperation on the one hand and the rights of the accused on the other. Harmonizing the rights of the accused can help to find the balance between these two interests and thereby enhance cooperation between the Member States. This paper will not discuss the initiatives to harmonize the rights of the accused as a whole, but will focus on trials in absentia and the specific function of harmonisation, i.e., providing a common basis for effective cooperation between the Member States. To that end, this paper shall address three different aspects: the concept of mutual recognition and the role of standard-setting (Part II); the minimum standard for trials in absentia that can be derived from the case-law of the ECtHR (Part III); and the standard defined by the Framework Decision on trials in absentia (Part IV).[20]

II. The Principle of Mutual Recognition

The principle of mutual recognition has emerged from the free movement of goods, persons, and services among various countries as well as the establishment of the internal European market.[21] According to this principle, goods which are lawfully

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19 *See* Kim Willsher, *Doctor Loses Fight to Halt Stepdaughter Murder Trial*, THE GUARDIAN, Mar. 31, 2011, at 23.

20 *See* Council Framework Decision, 2009/299/JHA, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, Thereby Enhancing the Procedural Rights of Persons and Fostering the Application of the Principle of Mutual Recognition to Decisions Rendered in the Absence of the Person Concerned at the Trial, 2009 O.J. (L 81/24) [hereinafter Framework Decision: Enhanced Procedural Rights].

21 *See* Fernando Piera, *International Electronic Commerce: Legal Framework at*

produced in one Member State cannot be banned from sale in the territory of another Member State, even if they are produced according to technical or quality specifications different from those applied to its own products.[22] At the Tampere Summit of October 1999, the European Council transplanted the principle of mutual recognition to the area of police and judicial cooperation in criminal matters.[23] As has been mentioned above, the first measure implementing this principle is the Framework Decision on the European Arrest Warrant.

The new paradigm has been subject to severe criticism.[24] As a matter of principle, mutual recognition might apply to goods and services, but not to measures seriously interfering with the fundamental rights of the individual such as arrest and search warrants.[25] Nevertheless, a closer look at the traditional regime of mutual legal assistance reveals that the idea of mutual recognition is not alien to international cooperation.[26] On the other hand, the ambit of mutual trust is still rather limited in the European Union.

International cooperation in criminal matters requires the States to accept that they will assist each other in criminal proceedings that will be conducted on the basis of foreign law (i.e., the law of the requesting State). By extraditing the suspect, the requested State acknowledges that the proceedings will follow the lex fori, which might be quite different from its own laws of evidence, the legal status of the parties, etc.[27] If a state is not willing to accept this, it will not be afforded legal assistance in its

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the Begining of the XXI Century, 10 CURRENTS INT'L TRADE L. J. 8, 9 (2001) (describing the principle of mutual recognition in Europe in the context of electronic goods).

22 *See* Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltun für Branntwein, 1979 E.C.R. 645; *see also Commission White Paper on Completing the Internal Market*, COM (1985) 310, *available at* http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.

23 *See* Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999).

24 *See, e.g.*, Oliver De Schutter, *The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509, 545-46 (warning that there could be adverse consequences from mutual recognition in criminal cases).

25 *See* Steve Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 COMMON MKT. L. REV. 5, 23-36 (2004).

26 Sabin Gleß, *Zum Prinzip der gegenseitigen Anerkennung*, 116 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 353, 357 (2004).

27 *See* European Arrest Warrant, *supra* note 3, art. 2.

own proceedings either. So, mutual recognition is deeply rooted in the principle of reciprocity (*do ut des*) and is considered an integral part of international cooperation in criminal matters.

Nevertheless, mutual recognition in international cooperation is subject to limitations. If the proceedings in the requesting state are in conflict with the constitutional principles of the requested state, the latter will refuse to grant legal assistance.[28] This holds true for criminal law enforcement in particular because the accused faces serious interferences with his or her fundamental rights. As a result, discussion concerning the scope of the ordre-public-clause focuses on the protection of human rights.

By transferring the principle of mutual recognition to the area of cooperation in criminal matters, the European Council shifted the balance towards effective criminal law enforcement. Importantly, by promoting the idea of mutual trust between Member States in adoption of the Framework Decision on the European Arrest Warrant, the European Council abolished traditional obstacles to extradition. Nevertheless, the impact of the principle of mutual recognition is rather limited since the Framework Decision contains the majority of traditional reservations.[29] Thus, mutual recognition does not mean automatic execution, but simply leaves room for judicial review by the courts of the requested member state.[30]

A closer look at the European Arrest Warrant reveals that the new rules do not significantly change the traditional extradition regime very much. In essence, the changes are limited to three aspects.

First, the double criminality requirement has been abolished for thirty-two categories of crime.[31] These categories are supposed to reflect a common understanding of what kind of behavior

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28 *See id.* prmbl. (the agreement does not prevent the application of state constitutional principles).

29 For example, the Framework Decision allows Member States to refuse to execute the warrant if the offence is not covered by existing state provisions. European Arrest Warrant, *supra* note 3, art. 4 No. 1.

30 *See id.* art. 6, ¶ 2, art. 3-5.

31 *See id.* art. 2 ¶ 2. Double criminality refers to the traditional requirement that the crime (for which the accused is to be extradited) is considered a crime in both the requesting and requested countries. *See* Heilbronn v. Kendall, 775 F. Supp. 1020 (W.D. Mich. 1991).

should be considered a criminal offence.[32] Yet, because these categories are not yet fully harmonized, this is not always the case. Here, the Framework Decision's reliance upon mutual trust mitigates conflicts between thet national criminal law of the Member States, as they are all supposed to adhere to the same fundamental principles, including human rights.

Second, the Framework Decision lifted the ban on extradition of a requested Member State's nationals (which is deeply rooted in the constitutions of various Member States).[33] This deeply rooted principle appears to conflict with the prohibition on discrimination based on nationality.[34] Thus, the Framework Decision suggests that the nationality of the suspect should not protect him from being prosecuted in the Member State in which the crime was committed.[35] Therefore, mutual trust between the criminal justice systems is an essential precondition to a waiver of the constitutionally guaranteed ban on extradition of a State's own nationals.

Third, the Framework Decision does not provide for any exceptions relating to political, fiscal, or military offences.[36] This policy is based on rationale similar to that of the double criminality requirement.[37]

Apart from these three aspects, the traditional obstacles to extradition still apply to the new regime. The Framework Decision contains a list of thirteen obligatory and optional grounds for non-execution of a European Arrest Warrant.[38] This list also contains a catalogue of the obstacles to extradition originating from international treaties and national extradition laws of the Member States.[39] Most of those obstacles are intended to protect the rights of the accused. In the end, this catalogue has become

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32 *Cf. id.* art. 2 ¶ 3 (allowing for unanimous action to add new offences to the list).

33 *See* European Arrest Warrant, *supra* note 3, art. 4-5.

34 *See* TFEU, *supra* note 1, art. 18.

35 *See* European Arrest Warrant, *supra* note 3, art. 4.

36 *See id.*

37 *Cf. id.* (stating the various reasons Member States may refuse to extradite).

38 *See id.* art. 3-5; *see also id.* art. 1 § 3 for the European ordre public (replacing the national ordre-public-clauses of the Member States).

39 *Compare* European Arrest Warrant, *supra* note 3, art. 1 § 3 *with* Council Act, 1996 O.J. (C 313) 11.

quite extensive. Partially going beyond the ambit of national extradition law, the implementation of the Framework Decision triggered the introduction of new obstacles to extradition.

In Germany, this happened with regard to life imprisonment; although German extradition law does not prohibit the extradition of a suspect who faces life imprisonment, the German legislature has implemented the corresponding exception in the Framework Decision.[40] According to the new provision, the convicted person shall be entitled to apply for a judicial review of the penalty for up to twenty years.[41]

Nevertheless, this reservation only applies to the execution of a European Arrest Warrant, i.e., requests for extradition issued by another member state. As a consequence, a suspect facing life imprisonment may be extradited to a non-member state (e.g., the United States) without a guarantee of a review procedure.[42] This result seems at odds with the very idea of mutual recognition and mutual trust because it implies that Germany has less confidence in Member States than in non-Member States. Herein lies the paradox: the more the European Union and its Member States endeavour to protect human rights, the more they will insist that these rights be respected by other Member States in cooperation related to criminal matters.

The distinction between Member States and non-Member States is due to the fact that Member States have accepted certain standards as a common basis for cooperation (such as the European Convention on Human Rights and the Union's Charter of Fundamental Rights).[43] As a consequence, a Member State insisting on compliance with these standards cannot be regarded as

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40 *See* European Arrest Warrant, *supra* note 3, art. 5.

41 Europäisches Halfbefehlgesetz [EuHbG][Act on the European Arrest Warrant], Jul. 20, 2006, Bundesgesetzblatt [Federal Law Gazette] I at 1721, introducing § 83 No. 4 IRG [Act on mutual legal assistance in criminal matters]; *see* the Explanatory Memorandum to the Draft, BUNDESTAGS-DRUCKSACHE No. 15/1718, p. 21; *see also* Oberlandsgericht [Higher Regional Court] Köln, Apr. 27, 2009, Entscheidungen der Oberlandesgerichte in Strafsachen und über Ordnungswidrigkeiten [OLGSt] LUCHTERHAND WOLTERS KLUWER, 2011, at § 83 IRG No. 2.

42 The chance of being pardoned is considered to be sufficient. *See* ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [Federal Constitutional Court] June 7, 2005, BVERFGE 2259/04, 2 (Ger.).

43 *Joining the EU,* EUROPA, http://europa.eu/about-eu/countries/joining-eu/index_en.htm (last visited Nov. 25, 2011).

hampering the smooth functioning of cooperation in criminal matters and should instead be seen as indirectly enforcing the common standard.

Similar logic applies to a Member State's optional grounds for refusal, such as life imprisonment. Although a uniform standard is not yet defined by European Union Law, the Framework Decision takes up the concerns raised by life imprisonment, favoring a human rights oriented approach to the new extradition regime.[44] By adopting optional grounds for refusal, the European Union is setting human rights standards by soft harmonization. Member States are not obliged to amend their legislation on life imprisonment, but if they refuse to do so, they will risk that another Member State will insist on the standard adopted in the Framework Decision and the European Arrest Warrant will not be executed.[45] This approach can be defined as indirect harmonization.

To sum up, mutual recognition does not call for "blind trust," but has to be based on a common standard. The closer the cooperation, the stricter the standards can be without hampering the transnational enforcement of criminal law. This reasoning applies not only to obligatory (minimum) standards, but also to optional standards (soft harmonization).

III. Trials in Absentia & Article Six of the ECtHR

Though the European Convention on Human Rights (hereinafter the Convention) does not explicitly establish a minimum standard for trials in absentia,[46] the European Court of

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44 *See* European Arrest Warrant, *supra* note 3, art. 5 ¶ 2 (allowing member states to condition extradition of an accused person that may be sentenced to life in prison on a harmonized minimum standard).

45 *See id.*

46 *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Apr. 11, 1950, 213 U.N.T.S. 222 (establishing the following rights as fundamental: (a) adequate "time and facilities" to develop a defence; (b) prompt and detailed notice of the charges in a language which the defendant understands; (c) the ability to defend oneself or to choose one's own defence counsel, or be provided counsel "when justice so requires;" (d) to examine witnesses testifying against the defendant and present witnesses on one's own behalf; and (e) free interpretation services). For a further discussion of the matter, see Comm. of Experts on the Operation of the European Conventions in the Penal Field, *Judgments in Absentia*, Doc. No. 07E.98 (1998), http://www.coe.int/ (type 07E.98 in the Advanced Search box; select 07E.98 trial

Human Rights has on several occasions discussed under what conditions a trial in absentia can be considered to be compatible with the right to a fair trial.[47]

According to the case law of the court, the right to a fair hearing by a tribunal includes the right to take part in the hearing.[48] This right can be derived from the defence rights in Article Six Section Three of the Convention, which include the right to defend oneself in person and to examine witnesses, because the accused cannot exercise these rights without being present.[49] As a consequence, the accused must be notified of the hearing in order to exercise his right to take part in the trial.[50] It is not sufficient for the defendant to receive indirect notice of the proceedings against him,[51] and "such a waiver must . . . be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance."[52]

"A waiver of the right . . . must not only be voluntary, but must also constitute a knowing and informed relinquishment of the right."[53] In concrete terms, it is not sufficient that the defendant

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absentia) (last visited Nov. 25, 2011).

47 *See, e.g.*, Makarenko v. Russia, App. No. 5962/03, Eur. Ct. H.R., ¶ 135 (2009) *available at* http://www.echr.coe.int/echr/en/hudoc (select "HUDOC database;" and type in application number) (holding that defendant waived his right to be present at trial when he terminated his participation and refused to allow his counsel to represent him mid-trial); Poitrimol v. France, 277 Eur. Ct. H.R. (ser A.) at 13 (1993) (holding that due to failure to appear at an appellate proceeding, the defendant's counsel was prohibited from representing him, and his appeal from a sentence of one year in prison stemming from a custody issue was ultimately denied); Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) at 14, (1985) (convicting defendant in absentia of various crimes leading to imprisonment, because the Italian police alleged they could not locate him, and finding that the attempts to locate had been insufficient, citing the fact that the defendant had been served for other crimes during the time the police had claimed they had been unable to locate him.).

48 *Colozza*, 89 Eur. Ct. H.R. (ser. A) at 14.

49 *Id.*

50 *See id.* (declaring as contrary to Article Six of the Convention for the Protection of Human Rights and Fundamental Freedoms the trial in absentia of a man presumed to be intentionally evading arrest by authorities merely because they could not locate him).

51 T. v. Italy, 245 Eur. Ct. H.R. (ser. A) at 42 (1992).

52 *Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 13 (1993).

53 Makarenko v. Russia, App. No. 5962/03, Eur. Ct. H.R., ¶ 135 (2009) *available at* http://www.echr.coe.int/echr/en/hudoc (select "HUDOC database" and type in application number.).

has vague and informal knowledge of criminal proceedings that have been instituted against him; rather, a waiver requires an official and precise notification of the charge and the trial.[54] To find that a party has implicitly waived his right to take part in the trial, the court must find "that he could reasonably have foreseen what the consequences of his conduct would be."[55]

Particular difficulties arise if the accused makes himself unavailable to be informed of and to participate in the proceedings in order to escape trial.[56] If the accused has been notified of the charges and therefore, should reasonably have foreseen the consequences a conviction in absentia will not violate the right to a fair trial.[57] According to the court, by seeking to escape trial, the accused forfeits his right to participate in the hearing.[58] Although the ECtHR does not consider this conduct as an implicit waiver, the reasoning (foreseeability of the consequences) is quite similar.[59]

If the above-mentioned conditions are not met, the trial may not be held in the accused's absence.[60] A conviction in absentia, however, does not violate the right to a fair trial if the convicted person can subsequently obtain from a court, which has heard him, a fresh determination of the merits of the charge in respect of both law and fact.[61] Once again, it is up to the accused to decide whether to apply for review or to waive the exercise of this right. In any case, the review proceedings may not be made subject to the condition that the accused can prove that he was not seeking to evade justice or that his absence in the trial was due to force

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54 T. v. Italy , 245 Eur. Ct. H.R. (ser. A) at 42.

55 *Makarenko*, App. No. 5962/03 Eur. Ct. H.R.

56 For example in *Makarenko*, the defendant in a libel suit refused continue participation in the middle of the trial, and terminated his relationship with his three lawyers, thereby waiving his right to be present. *Id.*

57 Demebukov v. Bulgaria, App. No. 68020/01, Eur. Ct. H.R. ¶¶ 45-46, 57 (2008) *available at* http://www.echr.coe.int/echr/en/hudoc (select "HUDOC database" and type in application number.).

58 *See* Sejdovic v. Italy, 2006-II Eur. Ct. H.R. 231, 265-266; Medenica v. Switzerland, 2001-VI Eur. Ct. H.R. 119.

59 For a discussion about foreseeability of the consequences and implicit waiver, see *Makarenko*, App. No. 5962/03, Eur. Ct. H.R. ¶ 136.

60 *See* text accompanying notes 50-55.

61 Poitrimol v. France, 277 Eur. Ct. H.R. (ser. A) at 13 (1993).

majeure.[62]

In short, trials in absentia are considered to comply with the right to a fair trial if the accused has waived or forfeited the right to be present at the hearing. Regarding the waiver, the reasoning of the ECtHR is based on the consideration that the Convention confers individual rights, not obligations.[63] It is the accused who decides whether or not to exercise these rights. The waiver, thus, can be regarded as an integral part of the relevant individual right.[64]

The crucial point, however, is whether and under what conditions the waiver can be considered to be based upon the free will of the accused. In this regard, it seems doubtful that an accused who faces ten years imprisonment (or more) "voluntarily" waives his right to be present at the hearing when he seeks to escape trial and imprisonment. Accordingly, the ECtHR has emphasized in its case law that the absence of constraint is, in all circumstances, one of the conditions a waiver must meet.[65] Furthermore, when the accused faces several years imprisonment, additional measures must be taken to ensure that the accused is aware of the consequences of a waiver. What we are facing here is the problem of legal paternalism. As has been mentioned above, the ECtHR has held that a waiver must be attended by minimum safeguards commensurate to its importance.[66] Shall a person that has been accused of murder be able to waive his right to be present at the trial even if he thereby acts against his own interest? Under what conditions can we allow the defendant to waive the exercise of this right?[67] Unfortunately, the ECtHR has not elaborated on

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62 Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) at 15-16 (1985).

63 *See* Van Geyseghem v. Belgium, 1999-II Eur. Ct. H.R. 128, 145 (Bonello, J., concurring).

64 *See generally id.* ("What should be discouraged is the transfiguration of a privilege of the defendant into an onerous responsibility, which divests him of his right of defence should he choose not to exercise his fundamental right to attend.").

65 Deweer v. Belgium, 35 Eur. Ct. H.R. (ser. A) at 25 (1980) (accepting a monetary settlement under the threat that butcher shop would be closed for an indefinite period).

66 *See supra* notes 40-44 and accompanying text.

67 *See generally Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 13 (discussing the issue of requisite appearance in a criminal trial when it leaves the defendant exposed to a warrant that would lead to his arrest).

this specific issue with regard to trials in absentia.[68]

Whereas the waiver is based upon the free will of the accused as to whether to exercise his rights, the forfeiture of the right to appear acts as a sanction.[69] The court's concept of forfeiture is based on the premise that the accused is not only entitled to, but also obliged to appear at the trial.[70] According to the court, this obligation exists "both because of . . . [the defendant's] right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim . . . and of the witnesses."[71] But this does not seem to be a convincing argument because the accused "has an inalienable right to silence," and "a mute defendant is almost as productive as an absent defendant."[72] Thus, the benefit from an obligation of the accused to attend the trial is rather limited. On the other hand, as the analogy to the right to silence reveals, the states are not permitted to make the right to a fair trial subject to the condition that the

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[68] For a discussion of the right to waive appearance in a criminal trial, see *id.* at 13; *see also Colozza*, 89 Eur. Ct. H.R.(ser. A) at 15-16; *Deweer*, 35 Eur. Ct. H.R. (ser. A), at 25.

[69] *See generally* Van Geyseghem v. Belgium, 1999-II Eur. Ct. H.R. 128, 145 (Bonello, J., concurring).

> Article 6 § 3 (c) heralds the fundamental right of the accused "to defend himself in person or through legal assistance of his own choosing". The Convention offers a choice to the person accused: to secure his defence either in person or through legal support. The Belgian system has erased this choice. On appeal, the defendant must defend himself in tandem with his lawyer, or not defend himself at all. That system has hijacked from the defendant the options which the Convention devolves exclusively on him. The State acts as the prosecutor of the defendant, and also believes itself to be the sole arbiter of his choice of defence.
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> Article 6 § 3 (c) is meant to bestow on the defendant an alternative between two possible courses, both tending to maximise his best defence (and the promotion of the accused's "best defence" is an imperative constituent of the right to a fair hearing). He may opt to exercise that right either by appearing in court or by not appearing; in the first alternative, he may elect to conduct his own defence, or engage the services of a professional lawyer. In the second, the Convention allows his defence to be undertaken by a lawyer of his choice.

Id.

[70] *Id.*

[71] *Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 15.

[72] *Van Geyseghem*, 1999-II Eur. Ct. H.R. at 145 (Bonello, J., concurring).

defendant gives himself up for arrest.[73] The guarantees set out in Article Six of the ECtHR may not be used as a whip to make the accused appear in court.[74]

Adhering to the concept of forfeiture might turn out to open a Pandora's box containing a variety of sanctions against the right to attend the trial.[75] Although the ECtHR has emphasized that the national "legislature . . . must be able to discourage unjustified absences," the sanctions must comply with the principle of proportionality.[76] Since the right to be defended by a lawyer is a fundamental element of a fair trial, the suppression of this right would be a disproportionate sanction.[77] If the accused is not present at trial, representation by defence counsel would be the only chance for the accused to make arguments of law and fact in response to the charges against him or her.[78] Considering the crucial importance of the right to be present at the trial and to defend oneself in-person,[79] the reasoning of the ECtHR should apply to this right as well.

The ECtHR has emphasized the importance of an accused's presence at trial, arguing that the defendant should appear because of his or her right to a hearing, which would serve his or her own

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73 *Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 13.

74 *See Van Geyseghem*, 1999-II Eur. Ct. H.R. at 140 (noting that the right to legal representation in absence of the accused); Krombach v. France, 2001-II Eur. Ct. H.R. 35, 60-62

> [T]he fact that the defendant, in spite of having been properly summonsed, did not appear, could not—even in the absence of an excuse—justify depriving him of his right under Article 6 § 3 (c) of the Convention to be defended by counsel (ibid.). It was for the courts to ensure that a trial was fair and, accordingly, that counsel who attended trial for the apparent purpose of defending the accused in his absence, was given the opportunity to do so.

Id. at 60. *See also Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 15 (discussing the right to appeal).

75 For a more detailed analysis, see K. Gaede, *Fairness als Teilhabe—Das Recht auf konkrete und wirksame Teilhabe durch Verteidigung gemäß Art. 6 EMRK*, 775 *et seq* (Duncker und Humblot Berlin 2007).

76 *Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 15.

77 *See id.*

78 *Id.*; *Van Geyseghem*, 1999-II Eur. Ct. H.R. at 140.

79 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 46, art. 6.

interests.[80] This is, however, a reasoning that is incompatible with any kind of sanction for the failure to appear in court because this would turn a legal right into a binding obligation.[81] The very idea of an individual right is that it is up to the holder of this right to decide whether to exercise it or not and to bear the consequences of that decision. It is contrary to the very idea of individual rights (and goes far beyond the paternalistic approach that has been mentioned above) to punish a person for not properly acting in his or her own interest.

The limitations to the right to be present in court, as construed by the ECtHR, give rise to serious objections. Nevertheless, it should be kept in mind that the Convention sets out minimum standards.[82] Correspondingly, state parties still have a margin of discretion when implementing these standards into national law, and the ECtHR must take this into consideration.[83] Therefore, it will be up to the national legislature and the European Union to go beyond these minimum standards in order to strengthen the rights of the accused.

IV. The Framework Decision on Trials in Absentia

Due to its relevance in extradition practice, the Framework Decision on the European Arrest Warrant already provided legal guarantees relating to trials in absentia.[84] In 2009, this provision was replaced by an amended Framework Decision that specifically considered the "procedural rights . . . [regarding] decisions rendered in the absence of the person concerned at the trial."[85] Although the amended Framework Decision expressly referred to

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80 *Poitrimol*, 277 Eur. Ct. H.R. (ser. A) at 13.

81 *See generally Van Geyseghem*, 1999-II Eur. Ct. H.R. at 140 (arguing that the presence at trial is established as a waiveable right, rather than an obligation).

82 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 46, art. 53 ("Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.").

83 *See generally id.* (providing that nothing in the agreement shall limit the ability of parties to establish laws protecting rights in addition to those enumerated).

84 European Arrest Warrant, *supra* note 3, art. 5 § 1.

85 Framework Decision: Enhanced Procedural Rights, *supra* note 20, art. 2 (art. 4a European Arrest Warrant).

Article Six of the Convention,[86] it was not designed to harmonize national legislation on trials in absentia; rather, it aimed to redefine the grounds for non-recognition of a European Arrest Warrant and other cooperation instruments.[87] Nevertheless, by doing so, the amended Framework Decision triggered indirect harmonization of national law on criminal procedure.

The amended Framework Decision is closely orientated to the case law of the ECtHR, but provides more detailed rules for the conditions under which a conviction in absentia can be considered to be compatible with the right to a fair trial.[88] In general, the Framework Decision is based on the principle that trials in absentia can solely be recognized on the ground that the accused has unequivocally waived his right to be present at the trial.[89] In order to ensure that an accused's absence can be assumed to be based upon a voluntary and deliberate decision not to exercise his right, the Framework Decision requires the accused to be provided with detailed information.[90]

According to the Framework Decision, the accused can be assumed to have waived this right if he or she has received official information of the scheduled date and place of the trial and he or she was informed that a decision on his or her case may be handed down if he or she does not appear for the trial.[91] It must be unequivocally established that the accused was made aware of the scheduled trial.[92] This will not be the case if the accused has received the information in a language he or she does not understand.[93]

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86 *Id.* prmbl. ¶ 1.

87 *Id.* prmbl. ¶¶ 4, 6, and 14.

88 *See generally id.* ¶ 4 ("It is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence.")

89 *See id.* art. 2 ¶ 1.

90 *Id.*

91 Framework Decision: Enhanced Procedural Rights, *supra* note 20, prmbl. ¶ 7 and art. 2 ¶ 1.

92 *Id.*

93 Brozicek v. Italy, 167 Eur. Ct. H.R. (ser. A) at 18-19 (1989); *see also* Directive of 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the

In contrast, the Framework Decision does not follow the reasoning of the ECtHR that an accused who seeks to evade justice forfeits his or her right to participate in the hearing.[94] If a person who absconds and makes himself or herself unavailable to be informed of the trial is convicted in absentia, the conviction is not required to be recognized by another member state, i.e., extradition may be refused.[95] The Framework Decision thereby acknowledges that the accused may not be deprived of his or her right to a hearing in order to force him to turn himself or herself in to police.[96] The decision also emphasizes that the waiver must be based on the free will of the accused.[97]

Nonetheless, the relevant provision does not expressly state that the accused's absence during the trial cannot be due to constraint, i.e., the fear of being arrested and held in custody.[98] In this regard, the Framework Decision missed the opportunity to provide for more detailed procedural safeguards. Accordingly, the Framework Decision has been criticized for not making the presence of the accused obligatory in proceedings relating to serious crimes.[99] At first glance, such a rule seems to contradict the very idea of an individual right.[100] But, making the presence of the accused obligatory will prevent him from waiving his defence rights and thereby acting against his own interest.[101] This is

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Right to Interpretation and Translation in Criminal Proceedings, 2010 O.J. (L 280) 1 [hereinafter Directive].

94 Makarenko v. Russia, App. No. 5962/03, Eur. Ct. H.R., ¶ 135 (2009) *available at* http://www.echr.coe.int/echr/en/hudoc (select "HUDOC database" and type in application number).

95 Framework Decision: Enhanced Procedural Rights, *supra* note 20, ¶ 12.

96 *See* European Arrest Warrant, *supra* note 3, art. 5 § 1.

97 *Id.*

98 *Id.*

99 Stellungnahme des Deutschen Richterbundes [Opinion of the German Association of Judges] on the draft Framework Decision on the enforcement of judgments in absentia and amending Framework Decision 2002/584/JHA (March 2008) http://www.drb.de/cms/index.php?id=465.

100 *See supra* notes 65-74 and accompanying text.

101 For the obligatory presence of the accused see THE GERMAN CODE OF CRIMINAL PROCEDURE (section 230), 115-116, (New York University School of Law, pub., Horst Niebler, trans., 1965), Federal Court (Bundesgerichtshof), Oct. 2, 1952, 3 official Court reports (BGHSt) 187 (190-191). A translation of the actual version of the German Code is available at http://www.gesetze-im-internet.de/englisch_stpo/index.html.

obviously a rather paternalistic approach. In any case, if imprisonment for several years is at stake the waiver should be made subject to additional safeguards (such as legal advice and a formal requirement of an express waiver before a judge) in order to ensure that the waiver is based on a voluntary and well-considered decision.[102]

In practice, however, these concerns can be expected not to become relevant: A person accused of a serious crime will be arrested and, thus, be present at the trial, or else the accused will have managed to escape before being arrested. In that case, the authorities will not be able to inform him of the scheduled trial and, as a consequence, a trial in absentia will not comply with the standard of the Framework Decision.

A waiver of the right to a hearing can be derived not only from the deliberate absence of the accused, but also from a mandate to a defence counselor as well.[103] Accordingly, the accused must be aware of the scheduled trial when instructing a legal counselor to defend him at the trial. The waiver must be based upon the free will of the accused, and the accused must have deliberately chosen to be represented by a legal counselor, rather than appearing in person at the trial.[104] Therefore, a waiver cannot be established in an unequivocal manner when the accused has given a mandate to his counselor in order to be considered represented at trial yet does not appear in court out of fear of arrest.[105]

If the trial does not meet the conditions set out above, the accused should be granted a retrial or an appeal.[106] In both forums, the accused has the right to participate and to have the merits of his case reexamined.[107]

Despite some ambiguities in the language of the Framework Decision, its substantial requirements are compatible with the minimum standards of the European Convention on Human Rights.[108] While the Framework Decision goes beyond these

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102 *See* Directive, *supra* note 93, art. 3 § 8.

103 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, art.2 ¶ 1.

104 *Id.* prmbl.¶ 10.

105 *Id.* art. 4 (ii).

106 *See id.* art. 2 ¶ 1 (Art. 4a (1)(c)-(d) European Arrest Warrant).

107 *See supra* text accompanying notes 96-97.

108 *See supra* Part III for a discussion of the minimum standards set forth under the

standards by rejecting the concept of forfeiture,[109] it does not provide the procedural safeguards of a waiver.[110]

Apart from this criticism, there are two more critical points. First, the Framework Decision defines optional grounds for non-execution of a European Arrest Warrant.[111] Since the standard defined in the Framework Decision is mainly based upon the case law of the ECtHR[112] it should not be up to the member state to decide whether to abide by this standard or not.[113] For example, a violation of the right to be present at the trial ought to be a mandatory ground for refusal.[114]

The second point relates to the provision in the Framework Decision whereby an executing Member State is obliged to surrender a suspect if served with a European Arrest Warrant which states that the conditions set out above are met.[115] This provision contains an inherent reliance on the principle of mutual recognition, under which the assurance of the issuing Member State should be sufficient.[116]

This mechanism has been subject to severe criticism.[117] Opponents to this provision argue that the issuing Member State should not assess whether its own proceedings are in conformity with the right to a fair hearing in court, as the standard is likely to

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European Convention.

109 *See supra* text accompanying notes 94-102.

110 *See supra* text accompanying notes 103-107.

111 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, art. 2 ¶ 1 (Art. 4a (1) European Arrest Warrant) (noting that "[t]he executing judicial authority may . . . refuse to execute the European arrest warrant. . . .").

112 *See* ED CAPE ET AL., SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION 9-10 (Ed Cape et al. eds., Intersentia Antwerpen-Oxford 2007).

113 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, prmbl. ¶¶ 14-15 (discussing the limitations of the non-recognition policy).

114 *See id.* prmbl. ¶ 15 (stating that a violation of the right to be present at trial is only an optional grounds for refusal).

115 *See id.* art. 2 ¶ 1.

116 *See id.* prmbl. ¶ 6.

117 *See, e.g.*, Briefing Note: EU Strengthens Trials in Absentia - Framework Decision Could Lead to Miscarriages of Justice (Open Europe, Working Paper, September 3, 2008), *available at* http://www.openeurope.org.uk/research/#JHA (select "Justice, home affairs and migration" hyperlink; then select "EU strengthens trials in absentia" hyperlink).

be abused.[118] They argue that the executing country should have a "margin of discretion" to ensure "fundamental procedural rights" of its citizens.[119]

This criticism, however, is without merit. The obligation to execute the European Arrest Warrant requires more than simply "ticking a box."[120] A closer look at the form reveals that the issuing authority has to provide information about how the conditions set out in the Framework Decision have been met.[121] This obligation implies that the executing authority reviews the assessment of the issuing authority, and therefore it would make no sense to read it as requiring authorities to tick the box.[122] Additionally, as regards the execution of convictions, the Framework Decision contains a consultation mechanism whereby the executing state is required to "consult the competent authority in the issuing State, by any appropriate means" before "deciding not to recognize and execute a decision."[123] Therefore, an executing Member State is not without recourse when protecting the rights of an individual.[124]

Furthermore, both the issuing and the executing Member States are responsible for ensuring respect for the rights of the accused.[125] The Framework Decision clearly states that it "shall not have the effect of modifying the obligation to respect fundamental rights . . . including the right of defence."[126] As the European Court of Justice stated, "Fundamental rights form an integral part of the general principles of law whose observance the ECtHR ensures" drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human

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118 *See id.* at 9-10.

119 *See id.*

120 *See id.* at 1 (arguing that checking a wrong box could compel a country to hand over a person).

121 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, art. 2 ¶ 3.

122 *See id.*

123 *See id.* art. 3 ¶ 2.

124 *See id.* prmbl. ¶ 15 (stating that "[t]he grounds for non-recognition are optional" and then emphasizing the intent of the Framework Decision to "enhance the procedural rights of persons and to facilitate judicial cooperation in criminal matters.").

125 *See id.* art. 1 ¶ 2.

126 Framework Decision: Enhanced Procedural Rights, *supra* note 20, art. 1 ¶ 2.

rights on which the Member States have collaborated or of which they are signatories.[127] Simply stated, the intention of the Framework Decision is to improve judicial recognition between Member States, which necessitates both sides having a voice.[128]

Despite some ambiguities the Framework Decision on trials in absentia is a step forward because it establishes, at least in part, a standard that goes beyond those developed by the European Convention.[129] Nevertheless, this small step does little to enhance the rights of the accused and leaves the Member States responsible for ensuring that the right to be present at the hearing is respected.[130]

V. Conclusion

Although the principle of mutual recognition has become a cornerstone of ensuring "the creation of an area of freedom, security and justice," the implementation of this principle is only just developing in the European Community.[131] Since the process is still in its beginning stages, the Member States cannot be expected to rely on "blind trust" nor to "automatically" execute the request of another Member State. To ensure its successful application, Member States should utilize standards and review procedures upon which trust can be built.[132]

Indirect harmonisation is one way to facilitate the development of a common standard, whereby the national legislature retains the right to either adapt the national code of criminal procedure or trust that the courts of other Member States will execute decisions compatible with its standard.[133] The Framework Decision on trials in absentia illustrates the success of this approach, which allows Member States to retain much of their procedural autonomy.[134]

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127 *See* Case C-7/98, Krombach v. Bamberski, 2000 E.C.J. I-1956 ¶25.

128 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, art. 1 ¶ 1.

129 *See supra* text accompanying notes 994-102, 109-110.

130 *See* Framework Decision: Enhanced Procedural Rights, *supra* note 20, prmbl. ¶¶ 14-15 (discussing the limitations of the non-recognition policy and stating that the "grounds for non-recognition are optional").

131 *See* CAPE ET AL., *supra* note 112, at 2-4.

132 *See id.* (discussing standards and review procedures).

133 *See supra* text accompanying notes 44-45.

134 *See supra* text accompanying note 27.

While this might help to overcome Member States' opposition to harmonising national legislation on criminal proceedings, the impact of optional standards (soft harmonisation) is limited.[135]

In order to take human rights seriously, the European Union will have to overcome Member States' reluctance to abolish national peculiarities that dramatically interfere with citizen's right to a fair trial. The trial in absentia example illustrates that a common standard can be derived from the European Convention on Human Rights and the case law of the ECtHR.[136] By committing to enhance the rights of the accused, the European Union must establish a mandatory standard that considers the minimum standard of Article Six of the Convention, which effectively guaranteeing the right to be present at the hearing.

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135 *See supra* text accompanying note 45. It should also be noted that leaving implementation up to the Member States favors different national standards and thus hampers a smooth functioning of the new cooperation mechanisms.

136 *See supra* text in Part III for a discussion of this point.